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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Computer III Further Remand Proceedings: )  
Bell Operating Company )  
Provision of Enhanced Services; )

CC Docket No. 95-20

1998 Biennial Regulatory Review -- )  
Review of Computer III and ONA )  
Safeguards and Requirements )

CC Docket No. 98-10

**REPLY COMMENTS OF AMERICA ONLINE, INC.**

America Online, Inc. ("AOL"),<sup>1/</sup> pursuant to the Further Notice of Proposed Rulemaking ("FNPRM") released by the Federal Communications Commission ("FCC" or "Commission"), hereby submits its Reply Comments for consideration in the above-captioned docket regarding the implementation of the Commission's Computer III and Open Network Architecture ("ONA") rules in light of the Telecommunications Act of 1996 ("1996 Act").<sup>2/</sup>

**INTRODUCTION AND SUMMARY**

As the world's leader in branded interactive services and content, AOL has a substantial interest in ensuring that its members receive service in the most efficient, reliable, and economical manner possible. To preserve and strengthen the vibrancy of the online information

<sup>1/</sup> AOL operates two worldwide Internet online services: AOL Interactive Services, with more than 11 million members; and CompuServe Interactive Services, with more than 2 million members. AOL also operates AOL Studios, the world's leading creator of original interactive content. Other branded Internet services operated by AOL include AOL.COM, the world's most accessed Web site from home; AOL Instant Messenger, an instant communication tool available to everyone on both AOL and the Internet; and AOL NetFind, AOL's comprehensive guide to the Internet.

<sup>2/</sup> Further Notice of Proposed Rulemaking, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services and 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, CC Docket Nos. 95-20, 98-10 (rel. Jan. 30, 1998) ("FNPRM").

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services marketplace, the Commission's policies should reflect the fact that AOL and other information service providers ("ISPs") continue to rely upon functionalities and services provided by incumbent local exchange carriers ("ILECs") who are now competing vigorously in that marketplace. Accordingly, AOL is encouraged that the FCC is now reexamining its Computer III and ONA rules in order to ensure that the provision of information services by the ILECs and Bell Operating Companies ("BOCs") is open, fair, and nondiscriminatory.

As the FCC has indicated, any action in this proceeding must be guided by three fundamental goals. Specifically, the FCC must: (1) promote innovative information services for consumers; (2) ensure the development and continuation of a robust and competitive information service market; and (3) establish safeguards which minimize the potential for anticompetitive BOC behavior and reflect the fact that AOL and other ISPs continue to obtain local access to their customers largely through the BOCs bottleneck network facilities.<sup>3/</sup>

In its initial comments, AOL urged the FCC to require the BOCs to provide certain network functionalities and services at non-discriminatory, reasonable, and cost-based tariffed rates.<sup>4/</sup> A number of commenters agreed that to promote innovative information services to consumers both now and in the future, the FCC should develop a flexible process through which ISPs can gain access to the local exchange elements they require as new technologies develop.<sup>5/</sup> Likewise, several commenters joined AOL in recommending that the FCC minimize the potential for anticompetitive conduct by requiring the BOCs to provide intraLATA information

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<sup>3/</sup> FNPRM at ¶ 1. The FCC should not use this proceeding as a back-door means to revisit settled telecommunications issues, including whether interstate carrier access charges should be imposed upon ISPs and other ESPs. The FCC has already concluded, based upon a voluminous record, that ISPs and other ESPs, as well as their customers, pay fully for the telecommunications services the use.

<sup>4/</sup> See AOL Comments at 14-18.

<sup>5/</sup> See, e.g., Information Technology Association of America ("ITAA") Comments at 24-29; APK NET et al. Comments at 2.

services through a structurally separate affiliate, as is already required for interLATA information services.<sup>67</sup> Finally, to set safeguards in an increasingly deregulated marketplace, AOL and others recommended that the FCC streamline certain reporting requirements as long as it first ensured that independent ISPs have access to all information needed to offer information services.<sup>71</sup> Given the compelling public interest in promoting competitive information services, the Commission should act accordingly.

## **ARGUMENT**

### **I. ISPs MUST HAVE ACCESS TO CORE BOC FUNCTIONALITIES IN A MANNER THAT ALLOWS THEM TO COMPETE ON A FULL AND FAIR BASIS**

AOL's initial comments demonstrated that growth and development of information services can flourish via Commission policies which ensure that independent ISPs have access to core BOC functionalities and services in a manner that allows them to compete on a full and fair basis. While AOL would prefer to rely upon a fully competitive marketplace that provides a choice of telecommunications carriers offering the functionalities and services needed to serve its customers, the local telecommunications market is not yet sufficiently competitive so as to obviate Commission rules that safeguard competition in the information services market.

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<sup>67</sup> See, e.g., AOL Comments at 12-14; United States General Services Administration ("GSA") Comments at 3-6; Commercial Internet Exchange Association ("CIX") Comments at 14-15; CompuServe Comments at 6-7; ITAA Comments at 9-16.

<sup>71</sup> AOL Comments at 19-20; ITAA Comments at 23-24. In addition, AOL asked that the Commission conclude that the long-standing "basic services/enhanced services" definitions from the Computer Inquiry proceedings conform to the "telecommunications services/information services" terminology of the 1996 Act. AOL Comments at 5-8. In light of the fact that this definitional question was properly resolved in the Commission's Universal Service Report to Congress, AOL will not address this issue in its reply comments. Report to Congress, In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC No. 98-67 (released April 10, 1998) at ¶¶ 39-48 ("Report to Congress").

Such regulation is necessary for two reasons. First, AOL and other ISPs are largely dependent on the BOCs and other ILECs for local access to their customers.<sup>8/</sup> Second, AOL and other ISPs must compete against these BOCs and ILECs in the same information service marketplace.<sup>9/</sup> Until technological and market conditions advance to the point where the BOCs' and ILECs' local bottleneck control has been eliminated, the FCC must continue to ensure that all entities, whether affiliated with the BOCs or independent, can compete in an information service market which is open and fair.<sup>10/</sup>

In furtherance of the Commission's long-standing objective to prevent BOCs from using their local exchange market power to engage in unlawful discrimination against ISPs,<sup>11/</sup> AOL and other ISPs have asked the FCC to implement a workable system that requires BOCs to provide ISPs with needed functionalities at non-discriminatory, reasonable, and cost-based tariff rates.<sup>12/</sup> The BOCs have erroneously argued that any such request for direct access to these functionalities would "muddy the distinction between telecommunications carriers and ISPs" in a manner that would require that ISPs become telecommunications carriers.<sup>13/</sup> The fact is, however, that any Commission action in this proceeding which ensures ISP access to needed functionalities and services does not implicate, and would not alter, the regulatory status of an ISP.

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<sup>8/</sup> See AOL Comments at 9-10; Ad Hoc Telecommunications User Comments at 3; CompuServe Comments at 6-7; GSA Comments at 5-6; ITAA Comments at 12.

<sup>9/</sup> See AOL Comments at 10; CIX Comments at 5-6; ITAA Comments at 12-13.

<sup>10/</sup> See AOL Comments at 11; Ad Hoc Telecommunications User Comments at 3; CompuServe Comments at 6-7; ITAA Comments at 16.

<sup>11/</sup> FNPRM at ¶ 9.

<sup>12/</sup> See AOL Comments at 14-18; ITAA Comments at 24-29. As a threshold matter, neither AOL nor most other ISPs have asked that the Commission extend full telecommunications carrier section 251 rights to ISPs. See id.; see also APK NET Comments at 2 (The "unbundling" necessary to take advantage of xDSL technology is more like "ONA-type" unbundling and less like "section 251" unbundling.).

<sup>13/</sup> See, e.g., BellSouth Comments at 27-28; GTE Comments at 13-15.

On the contrary, AOL's request for access to core BOC functionalities is fully consistent with the FCC's original Computer III and ONA policies, which recognized that preserving and strengthening competition in the information services market necessitated rules guaranteeing non-BOC ISPs access to local networks and functionalities on an equal basis with the BOCs' affiliated ISPs.<sup>14/</sup> The issue before the Commission is not whether ISPs should be transformed into telecommunications carriers, but rather how to best foster an open, full and fair competitive playing field for ISPs.<sup>15/</sup> Consequently, it is no answer, as many ILECs urge, to say that there need not be any access or unbundling since ISPs can also become, or affiliate with, competitive LECs.<sup>16/</sup>

The proposition that access to certain core BOC functionalities does not transform ISPs into telecommunications carriers is not only consistent with the FCC's long-standing policy, but is also critical to the continued development of a fully competitive information services marketplace. Reclassifying ISPs – who are definitionally distinct<sup>17/</sup> – as “telecommunications carriers” would stifle competition in the information service marketplace because it would require independent ISPs to bear costs and regulatory obligations that are not commensurate with their ISP status. While ISPs may decide to become certified as telecommunications carriers, they do so with the knowledge that a panoply of rights and obligations necessarily follow from that decision.

Subjecting ISPs who may not desire to provide telecommunications services to telecommunications regulation would unnecessarily require them to abide by extensive and

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<sup>14/</sup> See FNPRM at ¶ 9.

<sup>15/</sup> See id. at ¶ 1.

<sup>16/</sup> See, e.g., Ameritech Comments at 6-7; BellSouth Comments at 16-18, 28; SBC Communications at 11-15.

<sup>17/</sup> See Report to Congress, at ¶ 32.

onerous communications laws, regulations, and policies of the federal government and over fifty state jurisdictions, including certification requirements, tariff filing obligations, reporting and fee requirements, and monitoring and compliance duties.<sup>18/</sup> The result would be to diminish competitive choice for end users in the information services market by artificially raising the costs and burdens associated with entering and competing in that market. Moreover, to require ISPs to become, or affiliate with, a LEC based upon some misguided notion of regulatory parity is inappropriate, because it would subject ISPs to the overarching Title II obligations that follow from being common carriers.<sup>19/</sup> Many, if not all, of these requirements have little or no relevance to the provision of information services in a highly competitive market.<sup>20/</sup> Indeed, the genesis of, and need for, many of these requirements is the monopoly environment in which telecommunications services were historically offered and the need to safeguard the public from potential anti-competitive abuses.<sup>21/</sup> Thus, any rules which would have the effect of imposing Title II regulation are plainly inappropriate.

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<sup>18/</sup> See In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45 (Report to Congress), AOL Comments at 11-14 (filed January 26, 1998).

<sup>19/</sup> Title II of the Communications Act of 1934 requires, among other things, the filing of tariffs, 47 U.S.C. § 203, interconnection, 47 U.S.C. § 251(1), and compliance with the Communications Assistance for Law Enforcement Act, 47 U.S.C. § 229. Further, the FCC may also prescribe carriers' rates and practices, order refunds, make a valuation of the carrier's property, approve investments, inquire into the management of the carrier, and prescribe and oversee a carrier's accounts and accounting system. 47 U.S.C. §§ 204, 205, 213, 214, 218, 220.

<sup>20/</sup> The FCC has explicitly acknowledged as much, even in the case of competitive telecommunications services. See, e.g., First Report and Order, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 FCC 2d 1, 31 (1980) ([T]he economic underpinning of our proposal to streamline the regulatory procedures for non-dominant carriers flows from the fact that firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act. . . .). See also Report and Order, Petition of New York State Public Service Commission to Extend Rate Regulation, 10 FCC Rcd 8187, 8190, ¶ 17 (1995) (reaffirming that the measure of reasonableness under Section 201 should be found in "rates that reflect or emulate competitive market operations"); Second Report and Order, Policy and Rules Concerning the Interstate, Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934, 11 FCC Rcd 20730, 20752-53, ¶ 42 (1996) ("[W]e believe that competitive forces will ensure that nondominant carriers' non-price terms and conditions are reasonable."), *stayed on other grounds*, MCI Telecommunications Corp. v. FCC, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

<sup>21/</sup> See, e.g., Elkhart Tel. Co. v. Southwestern Bell Tel. Co., 11 FCC Rcd 1051 (finding a Section 201(a) violation because the carrier failed to provide interconnection upon reasonable request); Competitive Telecommunications

## **II. AOL'S PROPOSED STRUCTURAL AND NONSTRUCTURAL SAFEGUARDS ARE DESIGNED TO ENSURE THE CONTINUED DEVELOPMENT OF A FIERCELY COMPETITIVE INFORMATION SERVICES MARKETPLACE**

Rather than saddle online services providers with additional and unnecessary obligations premised upon a misguided notion of regulatory parity, the Commission should tailor its policies toward precluding the BOCs from leveraging their control over bottleneck telecommunications facilities in ways that would stifle competition and innovation in the information services market. To this end, AOL has recommended that the FCC: (i) require the BOCs to provide intraLATA information services through a structurally separate affiliate, as is already required for interLATA information services; (ii) develop a flexible process through which ISP and online service providers can gain access to the local exchange elements, services and functionalities they require as new technologies develop at non-discriminatory, reasonable, and cost-based tariffed rates; and (iii) ensure that independent ISPs have access to all information needed to offer information services before any reporting requirements are streamlined.<sup>22/</sup>

Significantly, a substantial number of commenters in this proceeding have recommended proposals consistent with those proffered by AOL. For example, numerous commenters, including the GSA, recommend that the FCC require the BOCs to provide intraLATA, as well as interLATA, information services through a separate affiliate.<sup>23/</sup> In light of the BOCs' continued control over local bottleneck facilities and the BOCs' incentive to discriminate against

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Ass'n; In the Matter of Advanced Telecommunications Corporation, 8 FCC Rcd 1224 (1993); Telecom\*USA, Inc., 8 FCC Rcd 1240 (1993); Allnet Communication Services, Inc., 8 FCC Rcd 1252 (1993); in which cases the FCC found that New Jersey Bell and The Chesapeake and Potomac Telephone Companies -- affiliates of Bell Atlantic -- and a number of other local exchange carriers unlawfully charged excessive rates to long distance carriers; Pacific Bell, 6 FCC Rcd 7467 (1991) (consent decree resolving FCC charge that Pacific Bell violated FCC cost accounting rules); New England Telephone and Telegraph Co. and New York Telephone Co., 7 FCC Rcd 822 (1992) (NYNEX telephone companies entered into a consent decree resolving FCC charges of accounting rule violations).

<sup>22/</sup> AOL Comments at 9-20.

<sup>23/</sup> See, e.g., GSA Comments at 3-6; CIX Comments at 14-15; CompuServe Comments at 6-7; ITAA Comments at 9-16.

independent ISPs in favor of its own affiliated services, there is agreement, that this structural safeguard is the most efficient, cost-effective way to protect against discriminatory access and cross-subsidization by the BOCs.<sup>24/</sup>

Likewise, to ensure continued innovation and competition in information services, several commenters have recognized the need for the Commission to develop a flexible process through which ISPs can gain access to the local exchange elements they require technology develops.<sup>25/</sup> For example, xDSL is now being deployed by incumbent LECs in an extremely aggressive fashion.<sup>26/</sup> An independent ISP's ability to utilize xDSL in connection with the delivery of service to its customers is ultimately dependent upon the FCC's willingness to ensure that the BOCs' provide nondiscriminatory access to certain xDSL components and services. Access by competitors to xDSL-based functionalities will stimulate demand, lower costs, and speed the deployment of xDSL technology.

The BOCs erroneously claim that any failure of ISPs to complain about particular aspects of ONA, or to avail themselves of the ONA unbundling rules, demonstrate that unbundling rules and reporting requirements are not needed for information services.<sup>27/</sup> As AOL and ITAA noted in their initial comments, however, ISPs have refrained from using the ONA process because it has been largely ineffective. In practice, the FCC's "common ONA model" does not allow ISPs

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<sup>24/</sup> See, e.g., GSA Comments at 5.

<sup>25/</sup> See AOL Comments at 14-18; ITAA Comments at 24-29; APK NET Comments at 2.

<sup>26/</sup> US WEST anticipates that its ADSL roll out will reach over 5.5. million customers in its 14-state region. US WEST press release, <http://www.uswest.com/com/insideus/news/012998.html>; GTE announced that it is "aggressively going after DSL, with plans to deploy DSL service to 6 million potential subscribers in 16 states. "GTE Promises 300 [Central Offices] Across 16 States With DMT-Based Fujitsu/Orckit," Telechoice, <http://www.telechoice.comxDSLnewz/showDSL.cgi?892223986>.

<sup>27/</sup> Bell Atlantic Comments at 17; US WEST Comments at 50.

to obtain efficient, cost-effective access to the functionalities ISPs currently need.<sup>28/</sup> Moreover, any failure of ISPs to complain about ONA was driven by the fact that the Commission did not actively police technological, operational, and regulatory issues as they surfaced, but rather left the discussion and resolution of issues to a forum that was not considered to be representative of all industry segments.<sup>29/</sup>

Finally, while AOL is not necessarily wedded to any specific BOC reporting requirements, the Commission must establish BOC reporting rules that will ensure that independent ISPs have access to all information needed to identify and utilize network functionalities in a non-discriminatory fashion. For example, as several commenters have underscored, CEI plans and certain other information requirements may be needed if they constitute the only notice that unaffiliated ISPs have of BOC provision of information services – indeed, they provide an essential check on possible anticompetitive conduct.<sup>30/</sup>

Consistent with AOL's position that market-driven policies should control whenever possible, AOL recommends that the FCC streamline and eliminate in this proceeding any unnecessary reporting requirements. In the absences of a fully competitive marketplace, however, reporting requirements cannot and should not be eliminated to the extent they provide

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<sup>28/</sup> AOL Comments at 14-15; ITAA Comments at 20-22. See also Ad Hoc Telecommunications Users at 9-10; WorldCom Comments at 3-5.

<sup>29/</sup> See In the Matter of Filing and Review of ONA Plans, 4 FCC Rcd 1, 32 (1988). See also "MCI Slams ONA Regime, Says Alleged BOC/Bellcore Conspiracy on ISDN Undermines Policy," Telecommunications Reports at 31 (January 11, 1993). As evidence that the FCC's ONA process was "a failure," MCI cited an affidavit filed by a former Bellcore employee which stated that he had participated in a conspiracy with the Bell operating companies to establish technical standards for ISDN that would ensure BOC monopoly control over access to ISDN in order to prevent competition. Id.

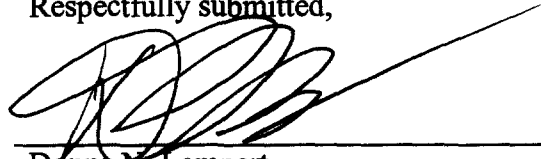
<sup>30/</sup> ITAA Comments at 16-17; AOL Comments at 19-20; AirTouch Paging Comments at 3-6 ("the CEI plan safeguard is critical to ensuring that consumers' enhanced services options are not limited by BOC strong-arm tactics, and that non-BOC affiliated ISPs have a level playing field."); GSA Comments at 6-9.

necessary information which is not otherwise available to the FCC and the public so as to promote open, fair, and nondiscriminatory competition.

### CONCLUSION

For the foregoing reasons, AOL urges the Commission to adopt the structural and non-structural safeguards set forth herein and in its initial comments as necessary to ensure that the market for information service remain open, robust, and fair.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of April, 1998, that a copy of the foregoing "Reply Comments of America Online, Inc." by messenger (\*) or by first class mail, postage prepaid to the following:

  
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